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SCHOOL BOARD AUTHORITY AND FIRST AMENDMENT RIGHTS: THE VIEW AFTER *BOARD OF EDUCATION, ISLAND TREES V. PICO*

by

JOSEPH D. McCANN*

In the United States, public education is generally committed to the authority of local school boards. Traditionally, these school boards have enjoyed broad — indeed, in some cases absolute — authority in carrying out their mandate of educating the young. The Supreme Court has, however, begun to recognize significant limitations on the power of these school boards with respect to the rights of the students in their charge. One such case examining the problem of school board authority and the rights of students is *Board of Education, Island Trees v. Pico*.¹

In *Pico* a local board of education removed a number of books from its school libraries, because it claimed the books were “anti-American, anti-Christian, anti-Semitic (sic), and just plain filthy.”² A challenge to this book removal by students based on a violation of their rights of free expression set the stage for a judicial consideration of the proper relationship between local board authority and the first amendment rights of school children. It is the purpose of this paper to examine this relationship.

This analysis will begin with an examination of the historical bases for the state’s educational authority and the traditional limitations placed on this authority by the courts. Next, the genesis of students’ rights will be reviewed along with the restrictions the growth of these rights has imposed upon school board authority. The paper will then turn to the *Pico* case itself — surveying the various judicial approaches taken in balancing the interests of school board authority and students’ rights and scrutinizing these approaches for the proper theoretical framework for student first amendment rights analysis. Finally, the paper will examine the uneasy resolution of the *Pico* problem in the Supreme Court and attempt to draw some broad principles from the fragmented decision regarding the scope of school board authority.

I. SCHOOL BOARD AUTHORITY

It is proper to begin with an analysis of the bases of school board authority and the traditional limits courts have placed on the state’s power to educate

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¹457 U.S. 853 (1982).

²*Pico v. Bd. of Educ., Island Trees*, 474 F. Supp 387, 390 (E.D.N.Y. 1979), *rev’d*, 638 F. 2d 404 (2d Cir. 1980), *aff’d*, 457 U.S. 853 (1982).

its youth. Essentially, there are three possible sources for school board authority: the *in loco parentis* doctrine, the state's role as *parens patriae*, and the "indoctrination" theory.³

A. *In Loco Parentis*

The concept of *in loco parentis*, literally "in the place of a parent,"⁴ was the early justification for school authority over students. The classic statement of the doctrine is from Blackstone who noted that a father:

... may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.⁵

This English common law doctrine was adopted in early America when education was still a parental responsibility and formal schooling an option.⁶ By sending his child to school, the parent implicitly delegated his parental powers of discipline and control to the school officials. When education became compulsory, courts continued to apply the doctrine⁷ even though it was now no more than a legal fiction. It is hard to find an implied delegation of authority when the parent has no realistic choice but to relinquish that authority to the state. The artificiality of the *in loco parentis* doctrine becomes particularly apparent when parents themselves question school action.⁸ It should be clear then that the doctrine is of questionable validity in establishing school board authority.

³See generally Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. Pa. L. Rev. 373 (1969); Comment, *School Library Censorship: First Amendment Guarantees and the Student's Right to Know*, 57 U. Det. J. Urb. L. 523, 525-30 (1980); Comment, *Not on Our Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 Neb. L. Rev. 98, 100-03 (1982); Note, *Right of School Board to Remove Books from Secondary School Libraries — "Board of Education, Island Trees Union Free School District No. 26 v. Pico,"* 19 Wake Forest L. Rev. 119, 125-30 (1983); Comment, *Censorship in the Public School Library — State, Parent and Child in the Constitutional Arena*, 27 Wayne L. Rev. 167, 170-71 (1980).

⁴Black's Law Dictionary 896 (4th ed. 1968).

⁵1 W. Blackstone, *Commentaries on the Laws of England* 453 (W. Lewis ed. 1898).

⁶57 U. Det. J. Urb. L., *supra* note 3, at 526.

⁷*Id.*

⁸See e.g. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). It should be noted that even when students challenge school actions, it is accomplished through guardians or parents as "next friends." *Bd. of Educ., Island Trees V. Pico*, 457 U.S. 853 (1982); *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438 (2d Cir. 1980); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976).

It has also been suggested that for a state to properly stand *in loco parentis*, it should assume the full duties, responsibilities and obligations of the parents. 57 U. Det. J. Urb. L., *supra* note 3, at 528-29. In fact, today the state is assuming more responsibility for the child's welfare than it ever did in the past. With the increased number of single parent or two income homes, the breakdown of the nuclear family, and various other social changes, the state is assuming control of a child's life earlier and more pervasively than ever before. The development of state child care programs, the increase in school counseling and psychological services, and, most recently, suggestions for a longer school year all indicate the fuller role the state plays in a child's education to the exclusion of the often absent parent.

B. *Parens Patriae*

An alternate basis for school board authority may be found in the concept of *parens patriae*.⁹ *Parens patriae* refers to the power of the state as sovereign to assume a guardianship over persons under a disability.¹⁰ The Supreme Court has recognized the state's interest as *parens patriae* in protecting its youth and its power to enforce this interest even against a parent. Thus, in *Prince v. Massachusetts*¹¹ the Court upheld the power of the state to convict a Jehovah's Witness for violation of child labor laws. The defendant had used her niece, a minor over whom she had custody, to sell religious literature. Unlike *in loco parentis* which is based on an implied delegation of authority, the *parens patriae* doctrine gives the state the power to intervene for the sake of the child even when contrary to the parent's wishes. The Court has continued to recognize this strong interest of the state in the well-being of its youth in *Ginsberg v. New York*,¹² *Erznoznik v. City of Jacksonville*,¹³ and *Federal Communications Commission v. Pacifica Foundation*.¹⁴

Notwithstanding the apparent power of the state to act in a child's best interests even when contrary to the parent's wishes, most of the cases employing the doctrine invoke *parens patriae* to support rather than derogate parental authority. In *Ginsberg*, for instance, the Court noted "that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."¹⁵ Similarly, in *Pacifica Foundation*, the Court found that *both* "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression."¹⁶ Even *Prince*, while finding the state's interest in protection of the child superior to that of the custodial aunt, recognized that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹⁷

⁹Translated by Black's Law Dictionary 1269 (4th ed. 1968) as "[f]ather of his country" or "parent of the country."

¹⁰*Id.* See 19 Wake Forest L. Rev., *supra* note 3, at 129-30.

¹¹321 U.S. 158 (1944). In *Prince* the Court also recognized that state authority over minors is broader than its authority over adults. *Id.* at 168.

¹²390 U.S. 629 (1968). The Court recognized a state's "independent interest in the well-being of its youth" in controlling sale of the material determined to be obscene for minors. *Id.* at 640.

¹³422 U.S. 205 (1975). The Court noted that a state would be able to protect minors even from material within first amendment protection but only in "relatively narrow and well-defined circumstances." *Id.* at 212-13.

¹⁴438 U.S. 726 (1978). The Court, here, agreed that the FCC could control the time that material that was offensive, but not obscene, could be broadcast over public airways. This state action was proper in order to protect youth.

¹⁵390 U.S. at 639.

¹⁶438 U.S. 726, 749 (1978) *quoting from* *Ginsberg v. New York*, 390 U.S. 629, 639, 640 (1968).

¹⁷321 U.S. at 166.

In addition, a number of Supreme Court cases have delineated the inherent limits of the state's power as sovereign to act against a parent's wishes for the perceived good of the child. In *Meyer v. Nebraska*¹⁸ and its companion case *Bartels v. Iowa*,¹⁹ the Court invalidated state attempts to prohibit the teaching of foreign languages in any school, public or private, to students below the eighth grade. The Court determined that the state could not interfere with the liberty interests of teachers to instruct in a foreign language or parents to hire the teachers for that purpose.²⁰

In *Pierce v. Society of Sisters*,²¹ the Court invalidated an Oregon statute requiring that all children between the ages of eight and sixteen attend public school. Relying on *Meyer*,²² the Court found the act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing . . . of children under their control."²³ The Court noted that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."²⁴

More recently, in *Wisconsin v. Yoder*,²⁵ the state argued the concept of *parens patriae* in requiring school attendance up to the age of sixteen for all children within its borders.²⁶ The Amish parents convicted under the compulsory attendance statute used the First Amendment free exercise of religion clause in defense. The Court held that this asserted interest of the parents outweighed the state's claim of power under the doctrine of *parens patriae* to extend the benefit of secondary education to children regardless of their parents' wishes.²⁷ In so holding, it limited the application of the doctrine as outlined in *Prince*,²⁸ and quoted from *Pierce v. Society of Sisters*²⁹ with approval.³⁰ The Court noted that the "holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."³¹

¹⁸262 U.S. 390 (1923).

¹⁹262 U.S. 404 (1923).

²⁰*Meyer v. Nebraska*, 262 U.S. at, 400.

²¹268 U.S. 510 (1925).

²²262 U.S. 390 (1923).

²³268 U.S. at 534-35.

²⁴*Id.* at 535.

²⁵406 U.S. 205 (1972).

²⁶*Id.* at 229-34.

²⁷The Court refused to address the problem of a possible conflict between the rights of the parents and the rights of the children themselves. *Id.* at 230-32. The dissent of Justice Douglas pressed for consideration of the rights of the children as well as those of the parents and the state. *Id.* at 241-46.

²⁸321 U.S. 158 (1944).

²⁹268 U.S. 510 (1925).

³⁰406 U.S. at 232-33.

³¹*Id.* at 233.

C. *The Indoctrination Theory*

Plainly, the power of the state as sovereign to act for the benefit of its youth is severely limited whenever it comes in conflict with the rights of parents. Nevertheless, the state's role in education should not be limited merely to the power it has as sovereign pursuant to the doctrine of *parens patriae*. As educator, the state has an "indoctrinative" function. The Court pointed out this function in *Ambach v. Norwick*³² where it emphasized the role of public schools in "inculcating fundamental values necessary to the maintenance of a democratic political system."³³ Similarly, in *Brown v. Board of Education*³⁴ the Court outlined the importance of public education in American life:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.³⁵

It seems clear that this "indoctrinative" function, sometimes termed the prescriptive model of education,³⁶ plays a larger role the younger the student is. Educators must be more selective in choosing among concepts to convey and skills to teach in elementary and secondary schools than they would be in college and post-graduate studies. At the college level at least: "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through a wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"³⁷ Notwithstanding this broad policy statement, few are willing to invalidate "any kind of authoritative selection" of suitable con-

³²441 U.S. 68 (1979).

³³*Id.* at 77.

³⁴347 U.S. 483 (1954).

³⁵*Id.* at 493.

³⁶The prescriptive and analytic models of education are differentiated as follows:

In the prescriptive model, information and accepted truths are furnished to a theoretically passive, absorbent student. The teacher's role is to convey these truths rather than to create new wisdom. Both teacher and student appear almost as automatons. Analytic education, however, signifies the examination of data and values in a way that involves the student and teacher as active participants in the search for truth. While these polar models represent only a theoretical paradigm that can never exist in pure form, we have traditionally conceived of pre-college public education as essentially prescriptive, and college and post-graduate studies as analytic.

Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. Pa. L. Rev. 612, 614 (1970).

³⁷*Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citations omitted). *Keyishian* dealt with a refusal of college instructors to sign loyalty certificates pursuant to New York's Feinberg Law. The Court found the law unconstitutional based partly on its concern for the academic freedom of teachers.

cepts and materials when addressing the role of elementary and secondary schools. This is traceable to the indoctrinative function of education at that level.³⁸

It is very difficult to logically differentiate between the *parens patriae* doctrine and the indoctrination theory unless one accepts a division of roles when the state acts with respect to its youth. In *Pico*³⁹ Justice Rehnquist's dissent argued for recognition of the distinction between the state acting as sovereign (*parens patriae*) and as educator (indoctrination). He noted "that the government may act in other capacities than as sovereign, and when it does the first amendment may speak with a different voice."⁴⁰ He then cited examples of less strict First Amendment limitations applied when the state acts as employer⁴¹ or as property owner⁴² rather than as *parens patriae*. Summing up, Justice Rehnquist stated:

I think the Court will far better serve the cause of First Amendment jurisprudence by candidly recognizing that the role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator. It must also be recognized that the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning.⁴³

By drawing this distinction between government's sovereign and educational roles, Justice Rehnquist created a theoretical framework for the axiom recognized in varying degrees by all who sat in judgment on the *Pico* issue — that the state as educator, especially at the elementary and secondary levels, must be granted great latitude in preparing students for future life.

Of course, the line between state as sovereign and state as educator is a blurred one, but as a general proposition the nearer one gets to the grassroots of the educational process, the less likely the courts are to intervene. It is suggested that this judicial reticence is due to an unarticulated perception that at the grassroots level the state is acting in its role as educator rather than as sovereign. Thus, the legislation attacked by the Court in *Meyer*,⁴⁴ *Pierce*,⁴⁵

³⁸Significantly, none of the thirteen judges who examined the *Pico* situation were willing to reject this indoctrinative function of public education on the secondary level.

³⁹457 U.S. 853, 908-10 (1982) (Rehnquist, J., dissenting).

⁴⁰*Id.* at 908.

⁴¹*Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

⁴²*Adderley v. Florida*, 385 U.S. 39, 47 (1966).

⁴³457 U.S. at 920.

⁴⁴262 U.S. 390 (1923) (prohibition against teaching foreign languages in any schools, public or parochial, to students below the eighth grade).

⁴⁵268 U.S. 510 (1925) (requirement that all school age children attend public school).

*Yoder*⁴⁶ and *Epperson v. Arkansas*⁴⁷ was enacted by state-wide legislatures to deal with broad social issues in the educational field. But when one reaches down to the day to day operations of schools by local authority and especially to the actual learning process in the classroom, there is an increased judicial reluctance to intervene.

This judicial reticence may be due in part to the fact that local school boards are in many ways the most representative of our institutions. In his *Pico* dissent, Justice Powell noted that "[s]chool boards are uniquely local and democratic institutions" with "only one responsibility: the education of the youth of our country during their most formative and impressionable years."⁴⁸ Justice Powell stressed that:

[T]he governance of elementary and secondary education traditionally has been placed in the hands of a local board, responsible locally to the parents and citizens of school districts. Through parent-teacher associations (PTA's), and even less formal arrangements that vary with schools, parents are informed and often may influence decisions of the board. Frequently, parents know the teachers and visit classes. It is fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board.⁴⁹

Certainly, this accessibility of the school board members to the people whom they serve is one reason for judicial reluctance to intervene with their decisions. When one deals with a school board, one generally deals with friends and neighbors in a local setting.⁵⁰ When one is affected by a law of the state legislature, there is the perception of the individual facing a contest against the monolithic giant of the state.

Partly because of the perceived responsiveness of local school boards to the needs of parents in the community, parental challenges to general curriculum, courses and books normally fail.⁵¹ However, the authority of school boards to operate in the process of educational indoctrination even when contrary to parental wishes is further bolstered by the fact that these boards normally only act in educational matters upon the advice of professional staff. Practically, school boards seldom actually choose books, materials or curriculum. The professional staff does this, and the board approves their deci-

⁴⁶406 U.S. 205 (1972) (compulsory attendance requirement in conflict with free exercise of religion clause).

⁴⁷393 U.S. 97 (1968) (prohibition of the teaching of evolution in public schools, and colleges and universities supported by public funds).

⁴⁸457 U.S. at 894.

⁴⁹*Id.*

⁵⁰This is certainly less so when dealing with centralized city school districts, but even the largest cities, New York City for example, recognize the desirability of local control for the most basic educational functions of its schools.

⁵¹See *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F. 2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970).

sions. Since the professional staff can generally claim a degree of academic freedom in their educational decisions,⁵² the school board basks in the glow of this first amendment right of its staff and it reflects upon their decisions thereby shoring up their authority.⁵³

While it is probably true that boards of education are uniquely representative of their constituents, this does not alleviate the possibility of local boards trampling on the rights of some parents in carrying out the will of the majority. It might be argued that courts are somewhat too reticent in this area since the Bill of Rights exists to protect the minority from the tyranny of the majority. Nevertheless, courts tend to heed the admonition of Justice Fortas in *Epperson v. Arkansas*⁵⁴ when called upon to examine state action in its indoctrinative educational role: "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."⁵⁵

Due to the judicial perception that school boards are uniquely representative of parental wishes in their role of indoctrinating students with community values, courts are reluctant to override school board decisions on basic educational matters. However, school boards represent *parents* and other voting community members; school boards do not represent children except to the degree that their interests coincide with the wishes of their parents. It is the recognition that school children also have constitutional rights in potential conflict with school board authority that is the basis of the next section.⁵⁶

II. STUDENT CHALLENGES TO SCHOOL BOARD AUTHORITY

While most challenges to school board authority have been built on the rights of parents,⁵⁷ the Supreme Court in *Tinker v. Des Moines Independent*

⁵²For a discussion of academic freedom see generally Schauer, *School Books, Lesson Plans and the Constitution*, 78 W. Va. L. Rev. 287 (1976); *Developments in the Law — Academic Freedom*, 81 Harv. L. Rev. 1045 (1968).

One commentator has suggested that the right of academic freedom emanates from various constitutional provisions, but particularly from the first amendment. T. Emerson, *The System of Freedom of Expression* 613 (1970).

⁵³For a situation where the academic freedom of teachers was forced to yield to the statutory power of the school board in determination of books for classroom use, see *Carey v. Bd. of Educ., Arapahoe*, 598 F.2d 535 (10th Cir. 1979). It is perhaps significant that the Arapahoe board did not short-circuit its regular policy of book review as the Island Trees board did in *Pico*.

⁵⁴393 U.S. 97 (1968).

⁵⁵*Id.* at 104.

⁵⁶In closing this section on school board authority, it should be noted that the Court still ascribes to the belief that the primary role of public education is indoctrinative — that it exists for the "preservation of a democratic system of government," that it is "the primary vehicle for transmitting 'the values on which our society rests,'" and that it "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Myler v. Doe*, 457 U.S. 202, 221 (1982) (citations omitted).

⁵⁷See discussion in last section.

*Community School District*⁵⁸ opened up the litigation arena to challenges based upon the rights of children in the school environment.⁵⁹ In *Tinker* Justice Fortas, speaking for the majority, quoted from *West Virginia State Board of Education v. Barnette*⁶⁰ where the Court said:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.⁶¹

The Court in *Tinker* then went on to proclaim what might be called the manifesto of student rights in the first amendment area:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuits recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.⁶²

The language that students are “‘persons’ under our Constitution” and may not be treated “as closed-circuit recipients of only that which the State chooses to communicate” may seem to sound the death knell of the indoctrinative powers of local boards of education. However, the facts of the case and later limitations upon student rights set out further on in the opinion con-

⁵⁸393 U.S. 503 (1969).

⁵⁹As noted in the last section, most challenges to school board authority have been concerned with the nurturing role of the parent. The first amendment free exercise cases in particular are more often concerned with avoidance of state interference with parental indoctrination of their beliefs into their children. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). (See dissent of Justice Douglas in *Yoder* attacking the Court's failure to consider the first amendment rights of the children in that case. 406 U.S. at 241-246). However, one pre-*Tinker* decision is notable for finding the children themselves entitled to equal protection of the laws pursuant to the fourteenth amendment. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Before *Pico*, the most significant post-*Tinker* decision on students rights was the due process case of *Goss v. Lopez*, 419 U.S. 565 (1975).

⁶⁰319 U.S. 624 (1943).

⁶¹393 U.S. 503, 507 (1969) quoting from *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

⁶²393 U.S. at 511.

strict the reach of the quoted passage considerably.

Tinker involved a student challenge to a school regulation prohibiting students from wearing black arm bands in school under threat of suspension. The arm bands were worn to protest the Vietnam War. The Court found the wearing of the arm bands to be "the type of symbolic act that is within the Free Speech Clause of the First Amendment."⁶³ After the statement quoted above that minor students do have constitutional rights even within the school environment, the Court went on to recognize that these rights might be limited by the school's need to function effectively. In line with this, the Court pointed out that a student cannot "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."⁶⁴ Since discipline exists primarily to create a structured environment within which the school's indoctrinative function may be carried out,⁶⁵ and since the facts of the case did not involve interference with the more substantive elements of education (e.g., curriculum, textbooks, etc.), *Tinker* did not cut as broad an inroad into school board indoctrinative authority as may at first appear.⁶⁶

There is, however, still much debate as to the scope of children's rights. One view holds that the essential difference between children and adults should be recognized, and children should only be granted rights after their appropriateness for a particular set of circumstances is demonstrated.⁶⁷ Otherwise, their rights must yield to the nurturing role of their parents or society. The converse of this point of view is that children have the same full spectrum of rights that adults enjoy since they too are "persons" under the Constitution. Proponents of this view feel that students are presumptively entitled to full constitutional rights unless special circumstances justify their curtailment.⁶⁸ While the expansive language of the *Tinker* opinion seems to indicate an acceptance of the second view, lower courts still show a reluctance to give student rights pre-eminence over traditional school board authority even in areas only peripherally related to the board's indoctrinative function.⁶⁹ Moreover, the Supreme Court, itself, handed down the feebly distinguished holdings of

⁶³*Id.* at 505.

⁶⁴*Id.* at 509 quoting from *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

⁶⁵Discipline and structure are less critical at the analytic levels of education (see note 35), because there free-flowing inquiry is encouraged with the main control of the student being self-discipline. Interestingly enough, even at the elementary level, progressive schools of education emphasize the analytic model over the prescriptive, and simultaneously downplay discipline and structure in the learning environment.

⁶⁶Justice Black in his dissent in *Tinker* had grave misgivings about the Court's creation of students' rights suggesting the students were not ready for this degree of liberty and that it would only encourage their defiance of teachers. 393 U.S. at 515-26 (Black, J., dissenting).

⁶⁷See 27 Wayne L. Rev., *supra* note 3, at 171-72 & nn. 27-30.

⁶⁸*Id.*

⁶⁹See discussion of hair length cases in J. Hogan, *The Schools, the Courts, and the Public Interest* 96-108 (1974), and discussion of student newspaper cases in A. Levine, *The Rights of Students: The Basic ACLU Guide to a Student's Rights* 31-41 (1973).

*Goss v. Lopez*⁷⁰ and *Ingraham v. Wright*⁷¹ in the area of students' due process rights thus demonstrating its own confusion over the proper premise with which to begin children's rights analysis. In *Board of Education, Island Trees v. Pico*,⁷² the Court had the opportunity to establish the proper premise for children's rights analysis, but the fractured decision gave no guidance on the problem.

III. BOARD OF EDUCATION, ISLAND TREES V. PICO⁷³

A total of thirteen federal judges⁷⁴ heard the question of whether summary judgment should be granted to the school board in the *Pico* case. Eleven of them felt compelled to write opinions. Seven of the thirteen determined there was a need for a trial on the school board's action in removing books from the school libraries, while the remaining six believed the school board was entitled to summary judgment. In the Supreme Court itself the split was five to four in favor of remanding for trial, but even the majority decision was fragmented into three separate opinions. It was hoped that *Pico* would clarify the relationship between students' rights and school board authority, but in many ways it only muddled the waters.

A. *The Facts*

In September 1975, three members of the board of education of the Island Trees Union Free School District attended a conference sponsored by Parents of New York United (PONY-U), a conservative parents organization.⁷⁵ At the conference, the board members received a list of books found "objectionable" by PONY-U complete with excerpts and editorializing by the organization.⁷⁶ Over the next few months, board members found nine of these books in the high school library, one in the junior high school library and one being used in the twelfth grade curriculum.⁷⁷ The board directed the removal of the eleven

⁷⁰419 U.S. 565 (1975) temporary suspension of a student from public school requires notice and an informal hearing).

⁷¹430 U.S. 651 (1977) (corporal punishment of a student requires neither notice nor a hearing).

⁷²457 U.S. 853 (1982).

⁷³474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982)

⁷⁴Actually, the first judge to hear the case was to be a New York State Supreme Court Justice as the plaintiffs originally filed for injunctory and declaratory relief in the state court. Bd. of Educ., *Island Trees v. Pico*, 474 F. Supp. 387, 389 (E.D.N.Y. 1979). However, the defendant school board removed to federal court. The parties' tactics may indicate that they both felt the Second Circuit decision in *Presidents Council v. Community School Bd.*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972), would be controlling. Indeed, Judge Pratt of the district court decided it was. 474 F. Supp. at 397.

⁷⁵474 F. Supp. at 389.

⁷⁶*Pico v. Bd. of Educ., Island Tress Union Free School Dist.*, 638 F.2d 404, 407-08 (2d. Cir. 1980).

⁷⁷474 F. Supp. at 389. The nine books found in the high school library were: 1) *Slaughter House Five*, by Kurt Vonnegut Jr., 2) *The Naked Ape*, by Desmond Morris, 3) *Down These Mean Streets*, by Piri Thomas, 4) *Best Short Stories By Negro Writers*, edited by Langston Hughes, 5) *Go Ask Alice* (anonymous), 6) *Laughing Boy*, by Oliver LaFarge, 7) *Black Boy*, by Richard Wright, 8) *A Hero Aint Nothing But A Sandwich*, by Alice Childress, and 9) *Soul On Ice*, by Eldridge Cleaver. The book found in the junior high school

books from the school libraries in February 1976, but was reminded by the superintendent that it was board policy to appoint a book committee to make recommendations before the board took action.⁷⁸ Nevertheless, on March 3 the board president issued a memorandum to the superintendent "reiterating the board's desire that all copies of the library books in question be removed from the libraries to the board's office."⁷⁹

When the board's actions in removing the books became known, it issued a press release stating that they had learned of books which were "anti-American, anti-Christian, anti-Semitic (sic), and just plain filthy" at the PONY-U conference, and that some books had been removed by the board for review.⁸⁰ The board noted that: the books do, in fact, contain material which is offensive to Christians, Jews, Blacks, and Americans in general. In addition, these books contain obscenities, blasphemies, brutality, and perversion beyond description.⁸¹

The press release then stressed the school board's role as an indoctrinator of community values and its position as moral guardian of the children of the community, while simultaneously denying that the board was "banning" or "burning" books:

This Board of Education wants to make it clear that we in no way are BOOK BANNERS or BOOK BURNERS. While most of us agree that these books have a place on the shelves of the public library, we all agree that these books simply DO NOT belong in school libraries, where they are so easily accessible to children whose minds are still in the formulative stage, and where their presence actually entices children to read and savor them. As U.S. Commissioner of Education, T.H. Bell, has said, "Parents have a right to expect that the schools, in their teaching approaches and their selection of instructional materials, will support the values and standards that their children are taught at home. And if the schools cannot support those values, they must at least avoid deliberate destruction of them."

We who are elected by the community, are the eyes and ears of the parents. It is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers.⁸²

The school board closed by emphasizing that they remained the "faithful

library was *A Reader for Writers*, edited by Jerome Archer, while *The Fixer*, by Bernard Malamud was the book used in the twelfth grade literature curriculum.

⁷⁸638 F.2d at 408-09.

⁷⁹474 F. Supp. at 390.

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.*

Watchdogs" of their community and that they would make the removed books available for inspection by "the UNbelievers."⁸³

On March 30, 1976 the board appointed a book review committee composed of four parents and four staff members, none of whom were librarians.⁸⁴ Nevertheless, the committee recommendations were substantially ignored by the board. It decided to return two books to the shelves, one without restrictions⁸⁵ and the other to be available to students with parental permission,⁸⁶ but to ban the other nine from the school libraries. The president of the board explained that the ban prohibited teacher assignments of the books even as suggested reading, but would allow for discussion of the books in class.⁸⁷

B. *The District Court Decision*

The students brought the suit initially in New York State Supreme Court, but the defendants successfully removed to federal court.⁸⁸ Judge Pratt of the district court found the Second Circuit decision in *Presidents Council, District 25 v. Community School Board No. 25*⁸⁹ controlling in *Pico* and refused to follow a Sixth Circuit case⁹⁰ and two district court cases⁹¹ which had limited the authority of boards of education to remove books from school libraries.⁹² The court rejected any concept of a library book acquiring "tenure"⁹³ once shelved, and instead applied the *Epperson* test⁹⁴ that the Second Circuit had used in *Presidents Council*.⁹⁵ The district court determined in *Pico* that it could not interfere with the school's daily operations since basic constitutional values had

⁸³*Id.* at 391.

⁸⁴*Id.*

⁸⁵Laughing Boy.

⁸⁶Black Boy.

⁸⁷474 F. Supp. at 391.

⁸⁸*Id.* at 389. See note 74, *supra*. The complaint set out five separate causes of action, but Judge Pratt pared it down to one. He denied the students standing to assert the academic freedom of librarians as a cause of action under either the United States or New York State constitutions. He also determined that the students' claims of freedom of speech under both the federal and state constitutions were governed by the same principles and so were really one cause of action. Finally, he noted the allegation of this constitutional violation was not really a separate claim from the claim under 42 U.S.C. 1983. (1983 is actually nothing more than a statute providing a remedy for separate and distinct constitutional deprivations). *Id.* at 394.

⁸⁹457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

⁹⁰*Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976).

⁹¹*Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right To Read Defense Committee v. School Committee*, 454 F. Supp. 703 (D. Mass. 1978).

⁹²For a careful analysis of all the key circuit and district court cases on the book banning issue see 61 Neb. L. Rev., *supra* note 3, at 116-32.

⁹³474 F. Supp. at 395.

⁹⁴"By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. at 104 (full cite given in footnote 54).

⁹⁵457 F.2d at 291 (full cite given in footnote 89).

not been "sharply and directly implicated" as required by *Presidents Council and Epperson*.⁹⁶ The court refused to find that students had a "right to receive" information in the school library or that this right was violated by content-based removals of library books.⁹⁷ In short, the district court came down heavily in favor of protecting the indoctrinative role of the board of education,⁹⁸ and recognized that this of necessity entailed control of the content of material made available:

Availability of funds, shelf space and personnel are all significant, but the principal reason for selecting and keeping books is their content. Indeed, in deciding what books to place in a school library a school board not only may, but must choose on the basis of content; to do less would be to neglect their statutory duty.⁹⁹

C. *The Second Circuit Decision*

Judge Pratt granted summary judgment to the Island Trees Board of Education, but this was reversed on appeal to the Second Circuit which remanded for trial.¹⁰⁰ All three members of the panel wrote separate opinions. Judge Sifton, a district judge sitting by designation, wrote for the majority. After a careful recitation of the facts, he seemed to appreciate the distinctive role of the government as educator by stating that the "application of the prohibitions of the first amendment to secondary school education presents complexities not encountered in other areas of government activity."¹⁰¹ He noted that "a principal function of all elementary and secondary education is indoctrinative — whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community."¹⁰² Nevertheless, he pointed out that students have First Amendment rights which require breathing room to avoid a "chilling effect" upon their exercise.¹⁰³ He tried to balance the competing interests by noting that the "everyday administration of a school's curriculum or a school library does not, either directly or indirectly, impinge on the free expression of ideas."¹⁰⁴ Therefore, more than a bare allegation of book removals from the school library would be necessary to establish the *prima*

⁹⁶474 F. Supp. at 397.

⁹⁷*Id.* at 396. This right to receive information was expounded by the Sixth Circuit in *Minarcini*, 541 F.2d at 583, and built on the concept delineated by the Supreme Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

⁹⁸It should be noted that Judge Pratt believed that the removal of the books reflected "a misguided educational philosophy," but that this decision was the board's not the court's. 474 F. Supp. at 397.

⁹⁹*Id.* at 396. The New York Education Law imposes a duty upon school boards to determine books to be used by the children within their districts. N.Y. Educ. Law § 1709 (McKinney 1969).

¹⁰⁰638 F.2d at 419.

¹⁰¹*Id.* at 412.

¹⁰²*Id.*, quoting *James v. Bd. of Educ.*, 461 F.2d 566, 573 (2d Cir.) *cert. denied*, 409 U.S. 1042 (1972).

¹⁰³638 F.2d at 412-13.

¹⁰⁴*Id.* at 414.

facie case.¹⁰⁵

Judge Sifton did determine, however, that a *prima facie* case could be made out in this case. The “unusual and irregular intervention in the school libraries’ operations by persons not routinely concerned with such matters” combined with circumstances that raise “grave questions” of the scope and intentions of the board in removing the books created an inference strong enough to state a *prima facie* case and shift the burden of persuasion to the defendants.¹⁰⁶ The judge acknowledged, however, that the school board might defend by claiming a material and substantial interference with its educational functions pursuant to the test laid out in *Tinker*.¹⁰⁷ But Judge Sifton then took the *Tinker* test much further toward judicial intervention in school board affairs than the Supreme Court had ever envisioned. He demanded both “narrow specificity” in the book review criteria and “sensitive tools” in the removal procedures to avoid overbreadth.¹⁰⁸ It is submitted that this amounted to a broad inroad upon school board discretion that was entirely unwarranted given the presumption that the board acts in its indoctrinative role for the good of its charges. Finally, Judge Sifton argued that the plaintiffs were entitled to a trial on the issue of motive — *i.e.* “an opportunity to persuade a finder of fact that the ostensible justifications for the defendants’ actions . . . were simply pretexts for the suppression of free speech.”¹⁰⁹

Judge Newman concurred in result, but did not elaborate on the complex procedural aspects that Judge Sifton developed at length in his opinion. Rather, Judge Newman, after recognizing the inculcatory function of schools,¹¹⁰ set out in broad policy terms the importance of avoiding the perception in students that some ideas can and will be suppressed.¹¹¹ Toward this end, he saw a key distinction between a refusal to acquire a book and a decision to remove one from the library — especially when made by leading school officials.¹¹² He believed the latter event was charged with symbolic significance and more likely to convey to students the impression that certain ideas were prohibited. Thus, schools would act to suppress independent thought, rather than encourage it.¹¹³ As a result of these views, Judge Newman determined the case should go to trial on the issue of the defendants’ motives.¹¹⁴

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 414-15.

¹⁰⁷*Tinker v. Des Moines*, 393 U.S. at 512-13.

¹⁰⁸638 F.2d at 417.

¹⁰⁹*Id.*

¹¹⁰*Id.* at 432.

¹¹¹*Id.* at 432-38.

¹¹²*Id.* at 435.

¹¹³*Id.*

¹¹⁴*Id.* at 436-438. Given Judge Newman’s premise that the real danger involves the perceptions of the students with respect to witnessing book removals, it is hard to understand why he believed the key issue to be determined at trial was the defendants’ motivation. Even if the defendants acted with the most innocent

Judge Mansfield registered a vehement dissent in *Pico*¹¹⁵ attacking the majority for overruling the "indistinguishable" decision of *Presidents Council*.¹¹⁶ He stated that no first amendment rights were infringed by removal of library books containing vulgarities and indecent matter which made them educationally unsuitable for children.¹¹⁷ To demonstrate his view that they were vulgar and indecent, he set out excerpts of the works in the margin of his opinion.¹¹⁸ He noted that it was the statutory duty of the board to prescribe appropriate books for its schools,¹¹⁹ and argued, somewhat unconvincingly, that the board did not act arbitrarily but "carefully, conscientiously and responsibly after according due process to all parties concerned."¹²⁰ Judge Mansfield stressed the importance of granting broad discretionary authority to school boards to ensure that their mandate would be carried out.¹²¹ He underscored this view that boards of education must have broad discretion by quoting from a Seventh Circuit decision upholding a book removal from a school library:

The rule [is] that complaints filed by secondary school students to contest the educational decisions of local authorities are sometimes cognizable but generally must cross a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation. Such a balance of legal interests means that panels such as the Warsaw School Board will be permitted to make even ill advised and imprudent decisions without the risk of judicial interference.¹²²

His view was that students were entitled to "reasonable" freedom of expression, but that school authorities had the power to remove library books that are "rationally" found to be unsuitable for educational purposes.¹²³

All of the members of the Second Circuit panel in *Pico* recognized in varying degrees the broad scope of state authority when acting as educator to ensure proper performance of its indoctrinative functions. At the one extreme, Judge Mansfield argued that school board decisions in their indoctrinative role need only be "rational" since students are only entitled to "reasonable" freedom of expression.¹²⁴ At the other end of the spectrum, Judge Sifton, after pay-

of motives, it would not change the perception of the students at the time of the removals that ideas can be suppressed. For an analysis of the motivation factor in the *Pico* case, see Note, *Judicial Clairvoyance and the First Amendment: The Role of Motivation in Judicial Review of Book Banning in the Public Schools*, 1983 U. Ill. L. Rev. 731 (1983).

¹¹⁵638 F.2d at 419-32.

¹¹⁶457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972).

¹¹⁷638 F.2d at 419.

¹¹⁸*Id.* at 419-22.

¹¹⁹See note 99, *supra*.

¹²⁰638 F.2d at 432.

¹²¹*Id.* at 425.

¹²²*Id.* at 428, quoting from *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980).

¹²³638 F.2d at 432.

¹²⁴*Id.*

ing lip service to the importance of "cautious deference to the expertise of educational officials within the academic environment,"¹²⁵ shackled local school boards to strict procedural safeguards in order to avoid the threat of chilling students' first amendment rights. Plainly, even Judge Mansfield did not believe school boards were entitled to absolute authority over their charges. Nor did Judge Sifton determine that secondary level students had first amendment rights coextensive with those of adults. The problem is inevitably one of reaching the proper balance,¹²⁶ and it is the difficulty of establishing this balance which led to the three separate opinions in the Second Circuit,¹²⁷ and, of course, to the failure of the Supreme Court to provide satisfactory guidance to boards of education regarding the scope of their authority.

D. *The Supreme Court Decision*

1. Analysis of the Plurality Opinion

Justice Brennan authored the plurality opinion which affirmed the Second Circuit's remand for trial. He was joined in the opinion by Justices Marshall and Stevens. He began his analysis by noting the constitutional limits upon the state's power to control even curriculum and classroom activities.¹²⁸ He then stressed how narrowly drawn the issue before the Court was — it involved only the *removal*, not the *acquisition*, of books from the school *library*, and there was no question about interference with school *curriculum*.¹²⁹

Justice Brennan recognized that "school boards have broad discretion in the management of school affairs,"¹³⁰ and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."¹³¹ Nevertheless, he noted that "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."¹³² He quoted *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the

¹²⁵*Id.* at 412, quoting from *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979), cert. denied, Cent. School Dist. v. Thomas 444 U.S. 1081 (1980).

¹²⁶For a discussion of the proper theoretical framework with which to address the balancing of school board authority with students' first amendment rights, see Comment, *A Definitional Approach to Secondary School Students Right to Know*, 42 Ohio St. L.J. 1025 (1981).

¹²⁷It is interesting to compare the Second Circuit's decision in *Pico* with the contrary result reached the same day in *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438 (2d Cir. 1980). In *Bicknell* each member of the same panel which decided *Pico* also wrote a separate opinion in this case.

¹²⁸457 U.S. at 861, citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Epperson v. Arkansas*, 393 U.S. 97 (1968) for authority.

¹²⁹457 U.S. at 861-62. The removal of *The Fixer* from the twelfth grade curriculum was challenged at the district court level, but was not an issue on appeal. See 474 F. Supp. at 397.

¹³⁰457 U.S. at 863.

¹³¹*Id.* at 864, quoting Brief of Petitioners 10.

¹³²*Id.*

schoolhouse gate.”¹³³ Thus, he laid out the usual parameters for balancing the interests in these student First Amendment cases.

However, the plurality then set down its premise for finding a First Amendment violation in school library removal cases, a premise with which no other opinion of the court agreed¹³⁴ — that students have a constitutional right to receive ideas.¹³⁵ Justice Brennan cited authority for this right in a long line of Supreme Court cases establishing the First Amendment “right to access” or “right to know” in other contexts.¹³⁶ In fact, the concept had already been applied in library removal cases, notably by the Sixth Circuit in *Minarcini v. Strongsville City School District*.¹³⁷

The plurality found that in two ways the right to receive ideas was “an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.”¹³⁸ First, there had to be a right to receive ideas to make the *sender's* right of expression meaningful. Otherwise, “[i]t would be a barren marketplace of ideas that had only sellers and no buyers.”¹³⁹ Secondly, “the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.”¹⁴⁰ The plurality pointed out that this is important because our system of popular government depends on citizen access to information in order to function properly.

The potential breadth of this right of students to know articulated by the plurality may have frightened even Justice Brennan. Perhaps, that is why he

¹³³*Id.* at 865 quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969).

¹³⁴It is unclear whether Justice White would accept the concept of a students' right to receive ideas since his opinion argued that the First Amendment issues should never have been addressed until after a trial on the merits. *Id.* at 883-84 (White J., concurring).

¹³⁵*Id.* at 866.

¹³⁶*Id.* at 866-67. The key cases given by the plurality were *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Stanley v. Georgia*, 394 U.S. 557 (1969); on remand *Stanley v. State*, 225 Ga. 273, 167 S.E.2d 756 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); and *Martin v. Struthers*, 319 U.S. 141 (1943).

Two other key cases identified by commentators as critical for establishing the student's “right to know” were not cited in the body of the plurality's opinion. *Procurier v. Martinez*, 416 U.S. 396 (1974), was relegated to a footnote, 457 U.S. at 867 n. 20, while perhaps the most important case in the area, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), was not cited at all. It may be that this failure to cite is more than an oversight. Both Justice Blackmun, the author of *Virginia State Bd. of Pharmacy*, and Justice Powell, the author of *Martinez*, rejected the student right to know concept proposed by the plurality in *Pico*.

For commentary discussing the right to know concept see 57 U. Det. J. Urb. L., *supra* note 3; Comment, “*Board of Education v. Pico*,” *School Library Book Removal and the First Amendment*, 14 St. Mary's L.J. 1063, 1074-79 (1983); Note, *First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books*, 52 St. John's L. Rev. 457, 467-74 (1978); Recent Developments, *Removal of Public School Library Books: The First Amendment Versus the Local School Board*, 34 Vand. L. Rev. 1407 (1981).

¹³⁷541 F.2d 577 *passim* (6th Cir. 1976).

¹³⁸457 U.S. at 867.

¹³⁹*Id.*, quoting from *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

¹⁴⁰*Id.* (emphasis in the original).

was so careful at the outset of his opinion to delineate precisely the limits of his decision. Later, he stressed that the school library was an “environment especially appropriate for the recognition of the First Amendment rights of students,”¹⁴¹ and then contrasted it with curriculum. While a school board was not entitled to “unfettered discretion” with respect to the library, Justice Brennan suggested that Board members “might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values.”¹⁴² This dictum indicating that school boards have *absolute* discretion in matters of curriculum goes further than any of the other opinions in *Pico* were willing to go and is certainly a surprising admission in Justice Brennan’s decision.

After recognizing the uniqueness of the school library as a home for ideas where selection of books by students is by free choice, the plurality did concede that boards of education “have a substantial legitimate role to play in the determination of school library content.”¹⁴³ However, they may not “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹⁴⁴ To determine if the students’ first amendment rights had been infringed, the plurality focused upon the motivation of the board in removing the books. If they “*intended* by their removal decision to deny [the students] access to ideas with which [they] disagreed, and if this intent was the decisive factor in [their] decision, then [they] have exercised their discretion in violation of the Constitution.”¹⁴⁵ However, as the dissent of Justice Rehnquist points out,¹⁴⁶ this motivation test is particularly inappropriate given the plurality’s emphasis on a student right to access. Both good and bad motives equally deny students their right of access. Similarly, the plurality’s distinction between removal of books and failure to acquire them appears equally fallacious. If students have a right to receive ideas in the school library, it would seem violated in either case.

Despite these logical inconsistencies, Justice Brennan did, at least, provide some permissive motivations for removals of library books. Books might be removed if their pervasive vulgarity or educational unsuitability were the decisive motivations of the board.¹⁴⁷ These motivations “would not carry the danger of an official suppression of ideas, and thus would not violate [students’] First Amendment rights.”¹⁴⁸

¹⁴¹*Id.* at 868.

¹⁴²*Id.* at 869. (emphasis in the original).

¹⁴³*Id.*

¹⁴⁴*Id.* at 870, *quoting from* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

¹⁴⁵*Id.* at 871 (emphasis in the original).

¹⁴⁶*Id.* at 904 (Rehnquist, J., dissenting). *See also Id.* at 885 (Burger, C.J., dissenting).

¹⁴⁷*Id.* at 871.

¹⁴⁸*Id.* One wonders how the motivation test employed by the plurality based upon Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), would be applied. Is it the motivation of the board as an official body or that of some or all of its members that is to be analyzed?

Examining the facts in *Pico*, the plurality decided to affirm the Second Circuit's decision that there were material facts in dispute which required a trial. The issue of the defendants' motives was called into question by the board's refusal to listen to the advice of its professional staff or book review committee, their reliance upon an outside organization's assertions about the books, and their "highly irregular and ad hoc" removal procedure.¹⁴⁹

2. Analysis of the Concurring Opinions

The decision to affirm the Second Circuit was concurred in by Justices White and Blackmun. Justice White argued that the issue should go to trial before the Court entered into an unnecessary "dissertation" on first amendment rights.¹⁵⁰ Justice Blackmun, on the other hand, did address the first amendment issue to provide what is in many ways the most coherent and logical analysis of the problem.

Justice Blackmun rejected both the plurality's concept of a student right to receive ideas and the artificial distinction between the school library and the other phases of the educational process.¹⁵¹ He also seemed to recognize that the school's indoctrinative function must often prevail over student claims of constitutional deprivations. He framed the balancing problem this way:

[T]he question in this case is how to make the delicate accommodation between the limited constitutional restriction that I think is imposed by the First Amendment, and the necessarily broad state authority to regulate education. In starker terms, we must reconcile the schools' "inculcative" function with the First Amendment's bar on "prescriptions of orthodoxy."¹⁵²

Following a more traditional first amendment analysis than the plurality, Justice Blackmun determined that "school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved."¹⁵³ While this is a motivational approach, it avoids the problems created by Justice Brennan's¹⁵⁴ and Circuit Judge Newman's¹⁵⁵ analyses.

The plurality's analysis of motivation was illogical, because the focus was on the students' right to access. Good or bad motives would equally deny this

¹⁴⁹*Id.* at 875.

¹⁵⁰*Id.* at 883. (White, J., concurring).

¹⁵¹*Id.* at 878-79 (Blackmun, J., concurring).

¹⁵²*Id.* at 879.

¹⁵³*Id.* 879-80. (emphasis in the original).

¹⁵⁴See *supra* notes 145-146 and accompanying text.

¹⁵⁵See *supra* note 114 and accompanying text.

right. Judge Newman's call for an analysis of motivation was also flawed because of his concentration on the perceptions of the students when faced with a book removal. A good or bad motive would not change their perception that ideas were being suppressed.

Justice Blackmun, however, avoided these problems by focusing initially on the school board's purpose and motivation. Thus, the first amendment rights of the students are only defined by examining the purpose and motives of the would-be violators. This approach is best adapted to the key role that school boards play as indoctrinators of community values. As long as board members act with the purpose and motive of carrying out their proper indoctrinative functions, student rights are not infringed, but in fact are enhanced as they are receiving the public education needed to prepare them for effective enjoyment of their rights as citizens in the future. When school board members act with the impermissible purpose and motive of prescribing orthodoxy by suppression of ideas, then student rights are violated. The board is no longer serving its proper function of education, but is using its position to impose its own political and social perspective upon its charges. The students have thereby had their first amendment rights infringed in two respects. First, they have had a "pall of orthodoxy" imposed upon them, and, secondly, they have been denied the education they need for full enjoyment of those rights in the future.

Justice Blackmun was careful to note that his purpose test was a "narrow principle" and that school board officials must have broad discretion to choose books for any "politically neutral" reason.¹⁵⁶ This would include a refusal to make a book available "because it contains offensive language or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are 'manifestly inimical to the public welfare.'"¹⁵⁷ This appears to be a much lower standard for school board book removals than the "pervasively vulgar" and "educationally unsuitable" standard of the plurality.¹⁵⁸

3. Analysis of the Dissenting Opinions

There were four dissenting opinions in *Pico*, yet they all stressed the same theme — deference to the local control of schools by elected officials. Chief Justice Burger, in a clever turn of phrase given the facts of the case, accused the plurality of refashioning the Court into a "super censor" of school board library decisions.¹⁵⁹ He attacked the plurality's creation of a right of access as merely a means for the Court's imposition of its own views about what books should be made available to students.¹⁶⁰ He argued that schools had no affir-

¹⁵⁶457 U.S. at 880.

¹⁵⁷*Id.*, quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

¹⁵⁸*Id.* at 871.

¹⁵⁹*Id.* at 885. (Burger, C.J., dissenting).

¹⁶⁰*Id.* at 885-86.

mative duty to provide information and that *Tinker's* holding only set limits upon school officials *prohibiting* student expression.¹⁶¹ Like Justice Rehnquist, the Chief Justice pointed out the illogical distinctions in the plurality opinion between removal and acquisition, and between library books and textbooks in terms of the asserted right to receive ideas.¹⁶² He noted that in any case the students had access to these ideas in other forums besides the school library.¹⁶³

The Chief Justice also rejected the criteria suggested by the plurality for book removal determinations. He found "educational suitability" to be a "standardless phrase," and could not accept the view that vulgarity had to be "pervasive" before book removal would be proper.¹⁶⁴ In addition, he renounced the plurality for failing to define what it meant in deciding that a board could not act in a "political manner."¹⁶⁵ School boards as elected bodies must of necessity act in a political manner in some sense of the word.

Justice Powell's dissenting opinion stressed the key fact that local boards of education are the most representative of all our government institutions.¹⁶⁶ He feared that student rights litigation would "corrode the school board's authority and effectiveness."¹⁶⁷ He also rejected the right to know concept and pointed to the opinions of the Chief Justice and Justice Rehnquist for demonstrations of the plurality's contradictions in recognizing this new right.¹⁶⁸ Moreover, like the Chief Justice, Justice Powell attacked the plurality view that "school board's 'discretion may not be exercised in a narrowly partisan and political manner'" as no more than a "standardless standard."¹⁶⁹ Finally, to emphasize what he considered the vulgarity of the works in question, he attached as an appendix Circuit Judge Mansfield's summary of excerpts of the books at issue.

Justice Rehnquist's incisive dissent underscores all the inconsistencies and fallacies in the plurality opinion. Unfortunately, it fails to suggest an effective alternative for balancing the competing interests in these cases beyond its helpful distinction between the state as sovereign and the state as educator.¹⁷⁰ For a viable framework for balancing the interests in the book removal cases, one must depend on the opinion of Justice Blackmun.¹⁷¹

¹⁶¹ *Id.* at 887-89.

¹⁶² *Id.* at 892-93.

¹⁶³ *Id.* at 891-92.

¹⁶⁴ *Id.* at 890.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 894 (Powell, J., dissenting). See *supra* notes 48-50 and accompanying text.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 894-95.

¹⁶⁹ *Id.* at 895.

¹⁷⁰ *Id.* at 908-10 (Rehnquist, J., dissenting). See *supra* notes 39-47 and accompanying text.

¹⁷¹ See *supra* notes 151-158 and accompanying text.

As mentioned above in the discussion of the plurality decision, Justice Rehnquist pointed out in his opinion that there can be no logical distinction between a failure to acquire books and their removal from the library shelves.¹⁷² Nor is there any real difference between the library and other parts of the school. Elementary and secondary schools exist to serve a inculcatory function, and school libraries serve as supplements to this inculcatory role — “they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas.”¹⁷³

Justice Rehnquist emphasized that not only was Justice Brennan’s finding of a student right of access to ideas unsupported by the Court’s prior decisions,¹⁷⁴ but that such a right was contrary to the school’s indoctrinative function.¹⁷⁵

Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students’ individual development. Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.¹⁷⁶

Addressing the motive test of the plurality, Justice Rehnquist argued that it was basically inconsistent with the right to know analysis. As was noted above,¹⁷⁷ “bad motives and good motives alike deny access to the books removed.”¹⁷⁸ If there is a right to receive information, the reason for the denial should be irrelevant.

After his dissection of the plurality opinion, Justice Rehnquist suggested adopting a test for student first amendment rights cases from *Tinker*.¹⁷⁹ In *Tinker* it was stated that “prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial

¹⁷²457 U.S. at 916.

¹⁷³*Id.* at 915.

¹⁷⁴*Id.* at 910.

¹⁷⁵*Id.* at 913-14.

¹⁷⁶*Id.* at 914.

¹⁷⁷*See supra* notes 145-146 and accompanying text.

¹⁷⁸457 U.S. at 917.

¹⁷⁹*Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

interference with school work or discipline, is not constitutionally permissible.”¹⁸⁰ Applying this test in *Pico*, Justice Rehnquist argued that the board may have suppressed vulgarity and profanity, but the ideas were not suppressed as the books could still be discussed by teachers and students.¹⁸¹ It is submitted, however, that the Rehnquist test is too weak to protect adequately the first amendment rights of students. Justice Rehnquist’s point that there is no suppression if there is no prohibition on classroom discussion ignores the coercive elements of book banning and its chilling effect on first amendment rights.

Justice O’Connor penned a terse dissent.¹⁸² She noted that since school board’s authority included the power to set curriculum and make initial determinations of school library content, it also extended to decisions to remove library books absent any further interference with the students’ rights to read and discuss the material.¹⁸³ She accepted Justice Rehnquist’s distinction between the government’s roles as sovereign and as educator.¹⁸⁴ Finally, she joined the Chief Justice in the view that these educational decisions were properly made by the elected board members, not by the courts.¹⁸⁵

IV. SCHOOL BOARD AUTHORITY AFTER *PICO*

The Supreme Court’s fractured holding in *Pico* did not make as broad an inroad into school board authority as the decision of the Second Circuit had. Even the Court’s plurality opinion refused to strap local boards to the complex procedural guidelines outlined in Judge Sifton’s analysis.¹⁸⁶ This leaves significant room for the exercise of discretion by school boards. Nonetheless, the plurality’s recognition of a right to receive ideas could pose a substantial threat to the indoctrinative functions of secondary and elementary education. While this recognition has no *stare decisis* effect, one can expect the concept to reappear in later students’ rights cases. At present, however, the right to know has been severely limited, even by the plurality, to the shelves of the school library.

The really crucial point to analyze in future student first amendment rights cases will be the motivation of the school board. This concept had the support of Justice Blackmun as well as the plurality. In fact, most of the assaults upon the principle by the dissents were narrowly directed at its incompatibility with the plurality’s notion of a limited right to receive ideas.

All of the justices recognized the indoctrinative role of local school boards

¹⁸⁰ *Id.* at 511.

¹⁸¹ 457 U.S. at 919.

¹⁸² *Id.* at 921.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* notes 106-08 and accompanying text.

and the necessary limits this must place on students' first amendment rights. All agreed that books that are educationally unsuitable can be removed as can books that are vulgar. The degree of vulgarity necessary for removal, however, remains unsettled since the plurality's requirement of "pervasive vulgarity" was rejected by the rest of the Court. There was a great deal of disagreement on whether books could be removed for "political" reasons, but most criticism centered on a failure to define the term. Nevertheless, there seems to be substantial agreement in the Court that school boards cannot suppress a particular political or social perspective unless it poses a threat to society or to the indoctrinative function of education.

In general terms, the *Pico* Court appeared to reject any concept that school children are tiny constitutional entities who must be afforded rights coextensive with adults. Given the severe limits even the plurality placed on the right to know concept, the justices seemed to recognize a basic constitutional difference between adults and children. The recognition of this basic difference is revealed in the substantial agreement of the Court as to the importance of the indoctrinative role of education. Thus, while *Pico* may have been one small constitutional step toward an appreciation of students' first amendment rights, in many ways it is more significant for its broad reaffirmation of local school board authority.
